DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, Colorado 80202 **Plaintiff:** DEFEND COLORADO, a Colorado nonprofit association v. **Defendants:** GOVERNOR JARED POLIS, and THE COLORADO AIR QUALITY CONTROL COMMISSION	DATE FILED: May 28, 2019 6:35 PM FILING ID: DFFDF3FF9F3D1 CASE NUMBER: 2019CV31577 ▲ **COURT USE ONLY** ▲
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THE GOVERNOR'S C.R.C.P. 12(b)(1) AND (5) MOTION TO DISMISS	

Defendant, Governor Jared Polis (the "Governor"), by and through the Colorado Attorney General's Office and undersigned counsel, moves to dismiss, with prejudice, Plaintiff Defend Colorado's third and fourth claims for relief pursuant to C.R.C.P. ("Rule") 12(b)(1) and (5).

***Certificate of Compliance with Rule 121 § 1-15*:** Undersigned counsel certifies that she conferred with Plaintiff's counsel about the relief requested by this motion and represents that Plaintiff opposes the same.

INTRODUCTION

Defend Colorado, a non-profit organization whose members allegedly include Colorado businesses and industry groups subject to state and federal air control regulations, chiefly

complains that the Colorado Air Quality Control Commission ("Commission") improperly declined to rule on its February 14, 2019 petition for expedited public hearing and request for declaratory order ("administrative petition"). *Compl.* ¶¶ 22, 11, 13-16, 141-154, 155-167. As relevant here, it also complains that the Governor violated the Distribution of Powers provision in Colo. Const. Art. III in two ways. *Id.* ¶¶ 168-176, 177-182.

Specifically, the third claim for relief alleges that the Governor improperly influenced and directed the Commission, as well as the Air Pollution Control Division ("Division") within the Colorado Department of Public Health and Environment ("CDPHE"), in the performance of their statutory duties, and that the Commission improperly acquiesced to his influence. *Id.* ¶¶ 174-76. The fourth claim for relief alleges that the Governor usurped the Commission's statutory duties through his issuance of a March 26, 2019 letter directed to the U.S. Environmental Protection Agency ("EPA") withdrawing an earlier request to extend Colorado's attainment date for the 2008 ozone National Ambient Air Quality Standard ("2008 ozone NAAQS"). *Id.* ¶¶ 180-82. For the reasons set forth below, the third claim must be dismissed under Rule 12(b)(1) and (5), and the fourth claim must be dismissed under Rule 12(b)(5).

BACKGROUND

Defend Colorado's administrative petition asked the Commission to hold a public hearing to evaluate what effect, if any, air pollution emissions from foreign countries (such as China) and exceptional events (such as forest fires) have on Colorado's ozone concentrations. *Compl.* ¶¶ 6, 114(a). Its goal was to ensure that an annual data certification letter from Colorado to EPA, that was due by May 1, 2019 (the "May Data Certification"), accurately reflected all sources of air pollution. *Id.* ¶ 3. The administrative petition also asked that, "if the results of the expedited

public hearing supported a Clean Air Act Section 179B international emissions and Section 319(b) exceptional events demonstration, the Commission issue a declaratory order directing CDPHE and the Division to include an international emissions and exceptional events demonstration with Colorado's" May Data Certification. *Id.* ¶ 114(b).

In 2012, the Denver Metropolitan/North Front Range ozone nonattainment area ("Denver Nonattainment Area") was designated a "marginal" nonattainment area under the 2008 ozone NAAQS, which means that the fourth highest monitored level of ozone concentration in the Area, over an average of the three preceding years (*i.e.*, the "design value"), was not below the 2008 ozone NAAQS value. *Compl.* ¶ 81; *see also* 77 Fed. Reg. 30,088 (May 21, 2012). After failing to attain the 2008 ozone NAAQS by its July 20, 2015 attainment deadline, the Denver Nonattainment Area was reclassified as a "moderate" ozone nonattainment area. *Compl.* ¶ 82; *see also* 81 Fed. Reg. 26,697, at 26,699 (May 4, 2016). As a "moderate" area, the deadline for the attainment of the 2008 ozone NAAQS became July 20, 2018. *Id.* ¶ 83; 81 Fed. Reg. at 26,699; *see also* 42 U.S.C. § 7511(a)(1). Attainment would be evaluated looking at the design value over the three-year period of 2015 to 2017. *See* 42 U.S.C. § 7511(b)(2)(A); 40 C.F.R. § 50.15. Defend Colorado filed its administrative petition in the hopes of freezing the Denver Nonattainment Area's classification at "moderate" to avoid the application of more stringent federal requirements associated with being downgraded to a "serious" classification. *Comp.* ¶¶ 23-29, 55-58. It believes that including international emissions sources, in particular those from Asia, in Colorado's May Data Certification is key to doing so. *Id.* ¶¶ 95, 107-08.

On June 4, 2018, Colorado, acting by and through the Division[1], sent a letter to EPA documenting that no monitor in the Denver Nonattainment Area had recorded any value exceeding the 2008 ozone NAAQS in 2017, and certifying compliance with all requirements and commitments in the revised SIP. *Compl.* ¶¶ 8, 100; *see* Exhibit 1—6/4/2018 Letter from Division Director G. Kaufman to EPA ("Division Extension Request") (attached to administrative petition as Exhibit 7A). The letter closed by stating: "*The Division* respectfully requests that EPA extend the attainment deadline for the [Denver Nonattainment Area] 2008 ozone NAAQS moderate nonattainment area by one year to July 20, 2019." *Id.* (emphasis added). The Division Extension Request made no representations, much less commitments, about the anticipated substance of the May Data Certification, including specifically whether it would include a Section 179B international emissions and/or Section 319(b) exceptional events demonstration. *See id.*

On November 14, 2018, EPA proposed to grant the Division Extension Request. *See* 83 Fed Reg. 56,781, at 56,784 (Nov. 14, 2018). On March 26, 2019, prior to final action by EPA, the Division, acting by and through the Governor, sent a letter to EPA notifying it of "Colorado's request to withdraw its June 4, 2018 request to extend the attainment date for the [2008 ozone NAAQS]." Exhibit 2—3/26/2019 letter from the Governor to EPA ("Division Extension

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[1] Defend Colorado alleges that "the *Commission* requested that EPA extend Colorado's deadline to comply with current NAAQS for ozone by one year," *Compl.* ¶ 8 (emphasis added) (citing Exhibit A), but that allegation is contradicted by the face of the Division Extension Request. *See* Exhibit 1. The Governor therefore asks this Court to take judicial notice under C.R.E. 201 that the *Division* made the request, not the Commission. This fact is not subject to reasonable dispute because it is evident on the face of Exhibit 1, the accuracy of which cannot reasonably be questioned.

Withdrawal") (attached to Complaint as Exhibit A); *see also Compl.* ¶ 18. The letter closed by stating: "If you have any questions, please contact Garry Kaufman, Director of the Air Pollution Control Division, Colorado Department of Public Health and Environment[.]" Exhibit 2. According to Defend Colorado, if the Division Extension Withdrawal "is accepted by EPA, it will have the retroactive effect of making Colorado's prior 2018 certification to EPA as the final certification relevant to Colorado's attainment date for the 2008 ozone NAAQS." *Compl.* ¶ 138. That certification, dated April 26, 2018, allegedly "showed that Colorado failed to attain the 2008 ozone NAAQS" in the Denver Nonattainment Area, which "would require that EPA designate [the Area] as in 'serious' nonattainment for the 2008 ozone NAAQS." *Id.* ¶¶ 139-140.

Defend Colorado's third and fourth claims ask this Court to declare that the Governor violated Colo. Const. Art. III and the Colorado Air Pollution Prevention and Control Act, § 25-7-101, *et seq.*, C.R.S. (2018) ("Colorado Air Act"), "by improperly influencing the Commission's decision to deny Defend Colorado's [administrative petition], and by unilaterally and improperly withdrawing Colorado's extension request to EPA, and enjoin and invalidate [the Division Withdrawal Request]." *Compl.* ¶¶ 20, 170-73, 178-79. It asserts that this Court has jurisdiction over its claims against the Governor on two grounds. The first is Rule 106(a)(4), which allows for judicial review of "[d]ecisions rendered by government bodies or officers acting in a judicial or quasi-judicial role." *Compl.* ¶ 34. Defend Colorado asserts that relief "is appropriate under Rule 106(a)(4) because [the Governor] abused his authority under Colorado law and there is no other 'plain, speedy, and adequate remedy otherwise provided by law.'" *Id.* (quoting C.R.C.P. 106(a)(4)). The second is Rule 57, which allows parties to seek a declaration of rights, status, and other legal relations. *Id.* ¶ 36. Defend Colorado asserts that relief under Rule 57 is

appropriate because it "has a legally protected right and interest in having a government that acts within the boundaries of our state constitution." *Id.* ¶ 35 (quotation omitted).

ARGUMENT

The Governor hereby fully adopts and joins in the Rule 12(b)(1) arguments in the Commission's May 17, 2019 Motion to Dismiss contesting Defend Colorado's standing to pursue its third claim for relief. *See Comm'n MTD*, pp. 8-15. Because Defend Colorado was not a proper petitioner before the Commission and its Complaint here failed to allege an injury in fact to a legally protected interest belonging to it or its members, this Court may not reach the merits of its third claim for relief that the Governor and Commission violated Colo. Const. Art. III and the Colorado Air Act. *See Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004) ("Standing is a threshold issue that must be satisfied in order to decide a case on the merits." (citing *HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879, 892 (Colo. 2002)).

If Defend Colorado has standing to maintain the third claim for relief, both it and the fourth fail to state a claim against the Governor for four reasons. *First*, no claim for improperly influencing or directing the actions of the Division and CDPHE lies against the Governor because they are under his direction and control as a matter of law. *Second*, the Complaint, while otherwise prolix, contains a dearth of allegations with concrete facts about how the Governor improperly influenced or directed any of the Commission's actions or decisions. The conclusory allegations it does contain are insufficient to rise above a purely speculative level and therefore fail to state a plausible claim for relief. *Third*, even if this Court accepts the wholly deficient "factual" allegations as true, no claim for improperly influencing or directing the actions of the Commission lies against the Governor because it is not under his direction and

control as a matter of law. *Fourth*, as a procedural matter, the Governor's actions are not subject to review under Rule 106(a)(4) because he does not act in a quasi-judicial capacity when influencing and directing the Division and CDPHE in their execution of Colorado law, or when taking his own actions to do the same.

I. Standard of review for Rule 12(b)(5) motions.

To survive a motion to dismiss, a complaint must state a plausible claim for relief. *See Warne v. Hall*, 373 P.3d 588 (Colo. 2016) (adopting the analysis employed by federal courts to evaluate motions to dismiss). When addressing a Rule 12(b)(5) motion, the court must accept properly pled factual allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). However, the court is "not required to accept as true legal conclusions that are couched as factual allegations." *Id.* Under Rule 12(b)(5), a "complaint may be dismissed if the substantive law does not support the claims asserted." *Western Innovations v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008).

In *Warne*, the Colorado Supreme Court explicitly adopted the plausibility standard articulated by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Warne*, 373 P.3d at 588. Under the *Twombly/Iqbal* standard, to survive a Rule 12(b)(5) motion to dismiss, a complaint must contain factual allegations sufficient to raise a right to relief "'above the speculative level'" and "'state a claim for relief that is plausible on its face.'" *Id.* at 591 (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal

conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

When considering a motion to dismiss for failure to state a claim, courts consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters proper for judicial notice. *See Denver Post Corp.*, 255 P.3d at 1088. As a result, this Court may consider the entirety of Exhibits 1 (referenced in *Compl.* ¶ 8), 2 (attached to the Complaint as Exhibit A), and the various portions of the Federal Register cited above because it was repeatedly cited by the Complaint (*see*, *e.g.*, *Compl.* ¶¶ 79, 81-82, 89, 145).

II. Colorado law authorizes the Governor to influence and direct the actions and decisions of CDPHE and the Division.

Colorado's Constitution distributes the government's power across the executive, legislative, and judicial departments and mandates that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, *except as in this constitution expressly directed or permitted*." Colo. Const. Art. III (emphasis added). Elsewhere, it expressly provides for the allocation of the "respective functions, powers, and duties" of the executive department across "not more than twenty departments." Colo. Const. art. IV, § 22. That same provision specifies that "[n]othing in this section shall supersede the provisions of section 13, article XII, of this constitution," which established a merit-based classified civil service system applicable to the majority of state appointive officers and employees, *"except that the classified civil service of the state shall not extend to heads of principal departments established pursuant to this section*." *Id.* (emphasis added). And per Colo. Const. Art. XII, §

13(7), "[t]he head of each principal department shall be the appointing authority for the employees of his office and for heads of divisions, within the personnel system, ranking next below the head of such department. Heads of such divisions shall be the appointing authorities for all positions in the personnel system within their respective divisions. *Nothing in this subsection shall be construed to affect the supreme executive powers of the governor prescribed in section 2 of article IV of this constitution.*" (emphasis added); *see also Compl.* ¶ 30.

CDPHE is a principal department of the executive department of state government. § 24-1-110(1)(i), C.R.S. (2018). It consists of the division of administration, which includes the Air Pollution Control Division at-issue here, and other "sections and units established as provided by law." § 25-1-102(2), C.R.S. (2018). The division of administration is housed in CDPHE under a "type 2 transfer," which means that "its prescribed powers, duties, and functions…are transferred to the head of the principal department into which the department, institution, or other agency, or part thereof, has been transferred." §§ 24-1-119(5)(a) and 105(4), C.R.S. (2018). With specific respect to the Division's air pollution control functions, "[CDPHE] may enter into agreements with any air pollution control agencies of the federal government…, but any such agreement involving, authorizing, or requiring compliance in this state with any ambient air quality standard or emission control regulation shall not be effective unless or until the commission has held a hearing with respect to such standard or regulation and has adopted the same in compliance with section 25-7-110." § 25-7-124(3), C.R.S. (2018). Per CDPHE's enabling statutes, "[t]he head of the department shall be the executive director" and "[t]he governor shall appoint said executive director, with the consent of the senate, and the executive director *shall serve at the pleasure of the governor.*" §§ 24-1-119(1) and § 25-1-102(1), C.R.S. (2018) (emphasis added). The

executive director in turn appoints the director of the division of administration." § 25-1-106, C.R.S. (2018).

"How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937). Here, Colorado's Constitution expressly exempts the heads of principal departments from the classified civil service system, which freed the General Assembly to require that such department heads serve at the Governor's pleasure. *See In re Interrogatories Propounded by Senate Concerning House Bill 1078*, 536 P.2d 308, 315 (Colo. 1975) (holding that "except as in this constitution expressly directed or permitted" language in Colo. Const. Art. III freed the electorate to adopt an initiated constitutional amendment authorizing the Chief Justice to appoint several members of reapportionment commission without violating the separation of powers doctrine even though reapportionment is normally a legislative function). Consistent with this constitutional freedom, the General Assembly enacted statutes governing the administrative organization of state government that vest the Governor with direction and control over CDPHE and the Division as a matter of law. *See* §§ 24-1-119(1) and (5)(a), 24-1-105(4), 25-1-102(1), 25-1-106, C.R.S. (2018). His exercise of that direction and control therefore does not violate Colo. Const. Art. III or the Colorado Air Act. *See In re House Bill 1078*, 536 P.2d at 315.

Put another way, if it was proper for the Division to issue the Division Extension Request in the first instance, which Defend Colorado does not contest, then it was proper for the Governor to issue the Division Extension Withdrawal. *Compl.* ¶¶ 12and 18 (complaining that the Governor "unilaterally and privately directed *CDPHE, and the Division*" to undertake certain acts and omissions, and "unilaterally issued" the Division Extension Withdrawal) (emphasis

added). As a matter of law, no claim lies against the Governor for "improperly" influencing or directing the actions of either CDPHE or the Division, or for acting on either's behalf. *Western Innovations*, 187 P.3d at 1158. And even accepting as true Defend Colorado's allegation that the Division Extension Withdrawal constitutes an "agreement between Colorado and the federal government under the Clean Air Act" to comply with any "serious" nonattainment requirements, *see Compl.* ¶¶ 138, 179-81, Colorado law expressly authorizes CDPHE to enter into such agreements. *See* § 25-7-124(3), C.R.S. (2018). As a matter of law, no claim lies against the Governor for directing it to do so. *Western Innovations*, 187 P.3d at 1158. Defend Colorado's third and fourth claims therefore fail to state a claim and must be dismissed.

III. Allegations that the Governor improperly influenced and directed the Commission's actions and decisions are conclusory and purely speculative.

Despite alleging that "virtually all" of the Commission's deliberations about its administrative petition "occur[ed] in private executive session" at two of its public meetings, *Compl.* ¶¶ 119, 126, Defend Colorado's third claim for relief contends that the Governor "has improperly and unilaterally attempted to influence the Commission's statutory duties to administer the Colorado Air Act," and the Commission has "acquiesce[d]" to the Governor's "improper influence over what should have been an impartial decision on" its administrative petition. *Id.* ¶¶ 174, 176. But none of the factual allegations in the Complaint set forth *how* the Governor improperly influenced the Commission, or point to any portions of the Commission's written orders denying the administrative petition as support for such improper influence despite referencing both. *See Compl.* ¶¶ 120-21, 127. Rather, they point only to public statements attributed to the Governor by media outlets. *See id.* ¶¶ 131-132. Similarly, its fourth claim

contends that the Division Extension Withdrawal authored and sent by the Governor was an "usurpation of the Commission's statutory duty and authority under the Colorado Act," *Compl.* ¶ 180, but notably does not allege any facts supporting the existence of a disagreement between the Governor and the Commission about whether the Division Extension Request should have been withdrawn.

These deficiencies are fatal to Defend Colorado's claims against the Governor under the plausibility standard for notice pleading in civil actions that the Colorado Supreme Court adopted in *Warne v. Hall*, 373 P.3d 588 (Colo. 2016). *Warne*, which involved an intentional interference with contract claim, held that conclusory statements in the complaint were "not at all entitled to an assumption that they were true" and found that it insufficiently alleged plausible grounds for relief because the non-conclusory allegations were "equally consistent with non-tortious conduct." *Id.* at 596. In doing so, the Supreme Court reasoned that "alleging that the [contract] conditions were disproportionate…without alleging the reasons why and manner in which the conditions were disproportionate, could only be considered formulaic or conclusory and therefore not entitled to be assumed true." *Id.* While the plausibility standard has yet to be discussed extensively by lower appellate courts, *Warne* explained that "there can be little question that the difference between a rule of pleading that effectively permits reliance on the compulsory process available in civil actions to discover whether grounds for the action exist in the first place and another that effectively bars such reliance without being able to first allege plausible grounds for relief can be extremely outcome-determinative." *Id.* at 594 (noting that it may result in "weeding out groundless complaints at the pleading stage.").

Defend Colorado's claims against the Governor here suffer from the same "outcome-determinative" problems as those dismissed in *Warne*. The vast majority of allegations in support of the third and fourth claims are not at all factual. Rather, they express Defend Colorado's legal conclusions about the duties and powers of the Commission relative to CDPHE and the Division, and wholly conclusory characterizations of the Governor's influence as "improper[]" and actions as "usurp[ing]." *Compl.* ¶¶ 20, 78, 174-76, 180. As such, they are "threadbare recitals" of a separation of powers violation, *Iqbal*, 556 U.S. at 678, that do not suffice to raise a right to relief "'above the speculative level.'" *Warne*, 373 P.3d at 591 (quoting *id.*). And the few non-conclusory allegations, such as that the Commission unanimously declined to rule on the administrative petition because Defend Colorado lacked standing to petition for a declaratory order, *see Compl.* ¶¶ 119-120, are "equally consistent" with the conclusion that the Governor did nothing to improperly influence or direct the Commission's autonomous actions and decisions, and that no disagreement exists between him and the Commission about whether the Division Extension Withdrawal was proper. *Id.* at 596. The third and fourth claims therefore are implausible and must be dismissed.

IV. Even if this Court accepts as true that the Governor improperly influenced and directed the Commission, such actions are of no legal effect.

The Commission is housed within CDPHE by virtue of a "type 1" transfer, which means that it "exercise[s] its prescribed powers, duties, and functions, including…the rendering of findings, orders, and adjudications, independently of the head of the principal department." §§ 24-1-119(7)(a), 24-1-105(1), and 25-7-125, C.R.S. (2018). It is comprised of "nine citizens of this state who shall be appointed by the governor with the consent of the senate." § 25-7-104(1),

C.R.S. (2018). "The governor may remove any member of the commission for malfeasance in office, failure to regularly attend meetings, or any cause that renders such a member incapable or unfit to discharge the duties of his office, and any such removal, when made, shall not be subject to review." § 25-7-104(4), C.R.S. (2018).

The Colorado Supreme Court considered an inter-governmental dispute involving another highly similar commission in *State Highway Comm'n of Colo. v. Haase*, 537 P.2d 300, 301 (Colo. 1975). The State Highway Commission ("SHC") was housed in the State Department of Highways ("SDH") by virtue of a "type 1" transfer, and given express statutory authority over certain functions of the Chief Engineer of the Division of Highways within SDH. *Id.* at 303 (citing §§ 24-1-126(2) and 43-1-105(1)(c), (e), C.R.S. (1973)). A dispute arose when SHC "issued a directive and an order to the Chief Engineer to prepare and submit the schedule [for the expenditure of funds for the construction of I-470] and assurance [that I-470 will be built in accordance with the schedule to the federal] Secretary [of Transportation]," and "that same day, [the Governor] countermanded the [SHC] directive by letter to [the] Executive Director of [SDH with] a direct order that no schedules nor assurances be submitted to the Secretary." *Id.* at 301. After the Chief Engineer refused to execute SHC's directives and orders, it filed a mandamus action against the Chief Engineer and the Supreme Court invited the Governor to intervene. *Id.* at 301-302.

The Supreme Court ultimately directed the Chief Engineer to carry out SHC's orders and directives. *Haase*, 537 P.2d at 305. Pointing to the structural demarcation of SHC from SDH due to the "type 1" transfer of the former to the latter, it held that the Governor's "directive *was a nullity*" because SHC "*by law* exercises its prescribed statutory powers independently of the

[Executive Director of SDH] to whom the Governor's order was sent." *Id.* at 302-03 (emphasis added). The same conclusion applies here because the Commission is likewise housed in CDPHE by virtue of a "type 1" transfer. §§ 24-1-119(7)(a), 24-1-105(1), and 25-7-125, C.R.S. (2018); *see also Compl.* ¶ 31. Thus, even accepting as true Defend Colorado's conclusory allegations that the Governor "improperly" influenced and directed the Commission's actions and decisions, *Compl.* ¶ 174, such allegations fail to state claim for violation of the separation of powers doctrine because the Commission exercises its powers independently of CDPHE, and by extension the Governor, as a matter of law. *Id.* at 302; *see accord Adarand Constructors v. Owens*, 2000 WL 490690, *4 (D. Colo. Apr. 24, 2000) (dismissing the Governor as a defendant to lawsuit challenging a "type 1" commission's authority to implement a new program because it was "an independent agency that is not within the direct control of the Governor's Office" and holding that "[t]o the extent any previous governor ever attempted to direct the commission's policy [through executive orders asking it to re-examine its goals], *any such attempt would have no legal effect* under the Colorado Supreme court's decision in *Haase*." (emphasis added)).

V. Rule 106(a)(4) review of the Governor's actions is unavailable.

It is well established that judicial review under Rule 106(a)(4) is "limited to judicial and quasi-judicial agency action." *Chellsen v. Pena*, 857 P.2d 472, 475 (Colo. App. 1992) (citing *State Farm Mutual Auto. Ins. Co. v. City of Lakewood*, 788 P.2d 808 (Colo.1990). As a result, "[a]dministrative…actions are not subject to review under [Rule] 106(a)(4)." *Id.* (citing *Sherman v. City of Colo. Springs Planning Comm'n*, 763 P.2d 292 (Colo. 1988). "Whether an agency action is quasi-judicial or administrative depends on the nature of the governmental decision and the process by which it is reached." *Id.* If the decision to be made "is likely to

affect the rights and duties of specific individuals and is reached through the application of preexisting legal standards or policy considerations to present or past facts developed at a hearing, the agency is generally acting in a quasi-judicial capacity." *Id.* (citing *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.*, 757 P.2d 622 (Colo. 1988)) (emphasis added). "Although the absence of a statute…requiring notice and a public hearing is not determinative, the existence of a legislatively mandated notice and hearing requirement is clear proof that an action is quasi-judicial." *Id.* (citing *id.*). An action "which may otherwise properly be characterized as executive, is an administrative act." *Prairie Dog Advocates v. City of Lakewood*, 20 P.3d 1203, 1208 (Colo. App. 2000) (citing *City of Aurora v. Zwerdlinger*, 571 P.2d 1074 (Colo. 1977).

The Commission is an "agency" for purposes of the State Administrative Procedure Act, § 24-4-101, *et seq.*, C.R.S. (2018) ("APA"), so its rulemaking and quasi-judicial adjudications are subject to judicial review under § 24-4-106. *CF&I Steel Corp. v. Colo. Air Pollution Control Comm'n*, 610 P.2d 85 (Colo. 1980); *see also* § 25-7-120(1), C.R.S. (2018). The Division and CDPHE are also agencies for purposes of the APA and Colorado law expressly requires the Division to conduct hearings in specified contexts, *see, e.g.*, C.R.S. § 25-7-115(7)(b), that are likewise subject to judicial review under the APA and C.R.S. § 25-7-120(1). But as relevant to Defend Colorado's third and fourth claims here, no provision of law required the Division or CDPHE to hold a hearing before issuing the Division Extension Request and the Division Extension Withdrawal, or "enter[ing] into agreements with any air pollution control agencies of the federal government" under C.R.S. § 25-7-124(3). Their actions in doing so—including any that the Governor "privately" influenced and directed or "unilaterally" took—are therefore

administrative or executive in nature, not quasi-judicial. *Chellsen*, 857 P.2d at 475; *Prairie Dog Advocates*, 20 P.3d at 1208; *Compl.* ¶ 12.

And because neither the Governor, the Division, nor CDPHE were required to "appl[y] preexisting legal standards or policy considerations to present or past facts developed at a hearing" before making their administrative decisions or taking their executive actions, there is no record of their decision-making process for this Court to review. *See* C.R.C.P. 106(a)(4)(I) ("Review shall be…based on the evidence in the record before the defendant body or officer."). Absent such a record, this Court has no basis for determining whether the Governor "exceeded [his] jurisdiction or abused [his] discretion" as alleged in the Complaint. *Id.* Instead, "review pursuant to C.R.C.P. 57 is the appropriate procedure where C.R.C.P. 106(a)(4) relief is unavailable…because review of the record is an insufficient remedy.'" *Grant v. Fremont Cty. District Court*, 635 P.2d 201, 202 (Colo. 1981) (citations omitted). Accordingly, if this Court allows either claim against the Governor to proceed past the pleadings stage, it should do so only under Rule 57.

CONCLUSION

For the above reasons and based on the above authorities, this Court should dismiss the claims against the Governor, with prejudice, pursuant to Rule 12(b)(1) and (5).

DATED: May 28, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 28, 2019, she filed a true and correct copy of the foregoing **THE GOVERNOR'S C.R.C.P. 12(b)(1) AND (5) MOTION TO DISMISS** and served a copy of same on all counsel of record listed below through the Colorado Courts e-Filing System on May 28, 2019:

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